IN THE

Supreme Court of the United States

APR 5
MICHAEL RODA

October Term, 1973
No. 73-1345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Response in Opposition to Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

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Questions Presented.

1. Does enforcement by respondent labor organization and employers of their collective bargaining contract involve "state action" repugnant to the United States Constitution on the ground that the statutes and decisional law of the State in general have authorized, approved, and encouraged the institution of the "union shop"?

2. Do the provisions of the collective bargaining agreement which: condition employment upon becoming a union member within seven days from being hired; require labor recruiting to be undertaken through a "hiring hall"; oblige the employer to discharge any

worker the union has determined to have engaged in antiunion activity; and establish a "check-off" system whereby the employer deducts union initiation fees, dues and assessments from the employees' wages *ipso facto* violate the workers' constitutional rights secured under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution?

Statement of the Case.

1. California has not become involved in any way in the private collective bargaining agreement here, but has adopted and maintained a consistent statewide policy of neutrality in the field of labor relations. Therefore, there has been no transformation of what formally appears to be no more than private action into "state action" or "action under color of state law". Petitioners therefore have failed to allege facts sufficient to state a claim justiciable by this Court.

2. No provision of the contract on its face denies the freedom of association, the right to work, the freedom of thought or any other right Petitioners broadly assert to be denied thereunder. Nor is there any claim by Petitioners that any provision was applied in violation of such rights. The extent to which any rights are impinged upon must be tolerated, for the "union shop" and the "closed shop" promote the long-term interests of individual workers as well as the work-force as a whole.

California Court of Appeals Holding That Petitioners do not Allege Facts Sufficient to State a Claim of "State Action" or "Action under Color of State Law" is Based on Clear Understanding of this Court's Decisions.

Petitioners assert that the policy of the State of California respecting union security agreements is so insistent, encouraging and protective that such arrangements concluded in the private sphere come thereby to acquire a "public" rather than a private character. On this point reference is made by Petitioners to legislative enactments and judicial decisions which uphold the validity of union security agreements. Reference is also made to court holdings which invalidate local right-to-work ordinances on the ground that such local action is preempted by state law.

Petitioners' pleadings contain no allegations that any governmental agency participated in negotiations between the grower and the union or in constructing the ultimate collective bargaining agreement. Nor was it said, nor could it be said, that the State of California is indirectly involved in reaching a particular result. It provides neither guidelines nor administrative machinery for the collective bargaining process.

In California, there is no legislative or administrative scheme comparable to that provided by the National Labor Relations Act for agricultural workers. The California law does no more than codify the right of working people to organize; employers are not compelled by law to recognize or bargain with workers' representatives.

It is far-fetched to suggest, as Petitioners do, that California law requires a particular result of bargaining.[1] Collective bargaining agreements are not invalidated either for the reason that they contain union se-

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[1]See Appendix A, attached hereto: Denial of Writ of Certiorari by U.S. S. Ct. (Feb. 19, 1974) in nearly identical case—*Mendoza, et al. v. U.F.W.O.C., et al.*, No. 73-884.

curity clauses or for the reason that they are without such. In the words of the California Court of Appeals, in its decision below:

> The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation.

The California Court of Appeals based its holding, to the effect that Petitioners fail to state a claim for relief, on this Court's reasoning in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 165. There, the regulations were considerably more detailed and the enforcement much more pervasive in the State's relationship to the private operation. Yet, despite Pennsylvania's involvement in liquor distribution by private clubs such as the Moose Lodge, it was held that the "scheme * * * does not sufficiently implicate the State in the discriminatory guest policies * * * to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S. at 178. It was concluded that though the State was deeply and elaborately involved in the system of alcohol distribution, it was not so intertwined with the racial discrimination of the private club as to make it indistinguishable from it. Here, California governmental agencies are involved in collective bargaining (in nowhere near the same degree), let alone in the particular conse-

quences which might flow from union security provisions. As a consequence, there is similarly no "state action".

The reliance of Petitioners upon the case of *Railway Employees Department, AFL v. Hanson,* 351 U.S. 225 (1956) is misplaced. They contend that it is authority for their position that "state action" is present in the case at bar. There, it was found that the federal government, by reason of its assertion of authority to invalidate State right-to-work laws which threatened the freedom to bargain of parties covered by the Railway Labor Act, had created a "federal imprimatur on union shop agreements." Petitioners point out the analogous posture of the State of California *vis-a-vis* union or closed shops: protecting and encouraging creation of collective bargaining agreements which contain such provisions. They assert that the finding of an official "imprimatur" in *Hanson ipso facto* demands a conclusion that "state action" is present here.

In *Hanson* this Court did not consider the standard of "state action"; it examined the degree of *federal* involvement in protecting union security provisions affecting employees covered by the Railway Labor Act. Moreover, it bears noting that not only was the federal involvement found to be meager, but differences between it and that of the State of California in this case render that of the latter miniscule in comparison.

Though the Court termed the policy of the federal government as creating an "imprimatur", a "stamp of approval", the expression of policy was found to be no more than permissive towards the collective bargaining process. There, as here, the government did no more than prevent restriction of alternative solutions avail-

able to labor and management. Lower levels of government were barred from interfering. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court assumed the identical role regarding governmental attempts to restrict the alternative solutions for promoting "open housing". Prevention of such restrictions does not present the nature or degree of involvement constituting "state action" under the Fourteenth Amendment.

There are important differences between the federal scheme and that presented by the State of California. The distinctions drawn by the California Court of Appeal, between the situation presented by the *Hanson* case and that before this Court, are well taken. (See Appendix A of Petitioners' Petition for a Writ of Certiorari, pp. 12 and 13.)

> Requirement of Association by Employee With Majority Representative of Co-Workers, When Balanced Against Long-Term Interests of Working People, is Consistent With Definition of Rights Guaranteed by the United States Constitution.

The Bill of Rights establishes goals for a society in which individuals are free to function as economically, politically and socially creative members of a community. The enunciation of those rights is an honored statement respecting the individual integrity of all citizens, the dignity to be accorded to each, as well as the individual potential to operate productively on both the material and the intellectual levels. At the same time, the recognition and protection of rights specifically defined by various of the Amendments to the United States Constitution is a vehicle for governing the relations of citizens.

The assertion of rights protected by the Constitution moves the society towards the attainment of the goals set forth in the Bill of Rights. The definition of these "rights" is refined in the process. What the "right" means in a particular situation is defined by consideration of what the framers of the Constitution had in mind as means to the end of a free, just and decent society.

In the context before the Court, an assessment must be made concerning the assertion of the "right to freedom of association". Does the "right" require that the union and closed shop be barred? We ask, in answering that question, whether that definition of the freedom of association is consistent with the goals of our society. Would that definition enhance the economic justice and resultant political productivity of all citizens of the self-governing society envisioned by the framers of the Constitution?

In *Hanson,* this Court concluded that Congress found the interests of working people to be enhanced by trade unionism, and found further that union security clauses enhance the development of strong trade unions. By passing the Railway Labor Act, Congress determined the long-range right of association to require flexibility in labor relations. The societal goals set forth in the Bill of Rights will be enhanced by ensuring union and closed shops, for trade unionism is a progressive element in economic and consequently political relations among groups of citizens.

Petitioners here do not allege, nor could they allege, that conditions have been imposed or that any monies were paid to the union pursuant to the union shop arrangement, to force ideological conformity or to other-

wise contravene First Amendment freedoms. As described by the Petitioners' pleadings, there is nothing to render this union shop different from that upheld in *Hanson* as a stabilizing force which justifiably requires all those covered by the collective bargaining agreement to pay the cost of securing and enforcing it.

Respondents urge this Court to conclude, as it did in *Hanson,* that the requirement of association with the majority representative of the workers, to the extent of requiring payment for the cost of securing and enforcing collective bargaining agreements, is a natural and necessary consequence of protecting the freedom of association. These union and closed shop arrangements are not only consistent with but are conducive of the exercise of rights guaranteed by the Bill of Rights.

Conclusion.

For these reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Court of Appeal, Fifth Appellate District of the State of California.

Dated: April 4, 1974.

Respectfully submitted,

JAMES VANCE HENRY,
JEROME COHEN,
Counsel for Respondents.

APPENDIX A.

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

Jonathan C. Gibson, Esq.
707 Broadway, Suite 1212
San Diego, Calif. 92101

Re: Mendoza, et al. v. United Farm Workers Organizing Committee, et al., No. 73-884.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

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Fresno, Calif. 93721